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No. 92-6073

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**In The  
Supreme Court of the United States  
February Term, 1993**

Richard Lyle Austin,  
Petitioner,  
vs.

United States,  
Respondent,

**PETITIONERS' AMICUS CURIAE BRIEF**

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### QUESTIONS PRESENTED

The decision rendered by the United States District Court of Appeals for the Eighth Circuit is based upon laws that are contradictory to their origin. We desire that the court should consider the following questions pertaining to the Petitioner: Richard Lyle Austin:

A. Whether or not proportionality applies to *in rem* forfeiture?

B. Whether *in rem* forfeiture violates the principles by which our government was established?

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## PROVISIONS OF LAW INVOLVED

This case primarily involves the proper application of the provisions of 21 U.S.C. § 881(a)(4), which states, in pertinent part:

"[a]ll conveyances...which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of illegal drugs" or drug paraphernalia.

and U.S.C. § 881(a)(7), which states, in pertinent part:

"[a]ll real property ... in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of" drug related crimes.

Pertinent provisions of the Constitution and other laws involved in this case are:

1. Amendment IV of the United States Constitution as it applies to the states:

"The right of the people to be secure in their persons ... against unreasonable ... seizures, shall not be violated..."

2. Amendment VIII of the United States Constitution:

"...nor excessive fines imposed, nor cruel and unusual punishments inflicted."

## STATEMENT OF THE CASE

"On June 13, 1990 Keith Engebretson met Austin at Austin's Auto Body shop, went to his mobile home, and then returned to the body shop, at which time he sold Engebretson two grams of cocaine. The next day, state law enforcement officers executed search warrants at the body shop and at the mobile home. The search of the body shop uncovered a twenty-two caliber revolver, some marijuana, and \$3,300 in cash. Additionally, a piece of mirror, a small white tube, and a razor blade were found on top of a barrel in the back of the shop. The search of the mobile home revealed an electronic Ohaus scale, a small baggy of cocaine, and \$660 in twenty dollar bills. The search also revealed a bindle of cocaine marked '1/2' as well as a baggy of marijuana.

"Austin pleaded guilty in state court to one count of possession of cocaine with intent to distribute. Shortly thereafter, the federal government initiated civil forfeiture proceedings against Austin's body shop and mobile home pursuant to 21 U.S.C. §§ 881(a)(4) and 881(a)(7) (1988). Austin resisted the government's attempt to seize his property. The government moved for summary judgment and supported its motion with an affidavit describing the Engebretson sale, the search of the property, and Austin's subsequent plea and conviction. Austin submitted an

affidavit stating, in relevant part, that the gun found in his body shop was used to shoot sparrows and that he received no money from Engebretson on June 13, 1990. The district court granted the government's motion for summary judgment and this appeal followed" *U.S. v. One Parcel of Property Located at 508 Depot Street, Garreson, Minnehaha County, South Dakota*, 964 F.2d 814 (8th Cir. 1992).

In the Federal Eighth Circuit Court of Appeals, the case was decided in favor of the United States. The court ruled as such because it was decided that this case was an *in rem* forfeiture and thus the punishment is not balanced in accordance to the crime. Furthermore, the court cited that "if the Constitution allows *in rem* forfeiture to be visited upon innocent owners...the Constitution hardly requires proportionality review of forfeitures..." The court also urged that this distinction be reviewed due to the ability of the government to take "any property whether it be a hobo's hovel or the Empire State Building." Hence the court decided that the Eighth Amendment does not require that the district court conduct any type of proportionality analysis in a civil forfeiture proceeding.

**A.**  
**THE APPELLATE COURT WAS INCORRECT IN  
 HOLDING THAT PROPORTIONALITY OF  
 PUNISHMENT SHOULD NOT BE CONSIDERED  
 IN THE *IN REM* FORFEITURE IN THIS CASE.**

**L**  
**Excessive Fines**

The Eighth Amendment specifically prohibits the imposition of excessive fines. "The Eighth Amendment proscription of cruel and unusual punishments prohibits sentences that are disproportionate to the crime committed ...The constitutional principle of proportionality has been recognized explicitly in this court for almost a century. In several cases the Court has applied the principle to invalidate criminal sentences." *Solem v. Helm*, 103 S. Ct. 3001 (1983).

Proportionality dates much farther back than our Constitution, however. "Proportionality is deeply rooted in common law jurisprudence. It was expressed in Magna Carta, applied by the English courts for centuries, and repeated in the English Bill of Rights in language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it...Three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive." *Solem v. Helm*, 103 S. Ct. 3001 (1983).



## II.

### Cruel and Unusual Punishment

The Eighth Amendment also prohibits cruel and unusual punishments. We feel that the deprivation of a disproportionate amount of a United States citizen's real property constitutes cruel and unusual punishment. Once Austin returns to mainstream life after a prison sentence, he will be required to find employment and lodging. The lack of these necessities, which were previously possessed by Austin and have been removed by the Eighth Circuit Appellate Court, leaves him little alternative but to reenter into a profession of criminal activity.

## III.

### Proportionality *In Rem*

Without doubt the Eighth Amendment was adopted with the intent to place a limit on the "prosecutorial" power of the government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the Eighth Amendment in the Bill of Rights." *Ingraham v. Wright*, 430 U.S. [651] at 666 [97 S.Ct. 1401, 1409-10, 51 L.Ed.2d 711 (1977)] The government is exacting too high a penalty in relation to the crime committed; they are confiscating a person's only means of sustenance for the possession of "a small baggy of cocaine... a bindle of cocaine marked '1/2' as well as a baggy of marijuana" found in the mobile home. This clearly constitutes a severe penalty in relation to the

offense committed yet the government is able to exact such a penalty because of the technical legal distinction regarding *in personam* and *in rem* actions. The Constitution requires proportionality when the government proceeds *in personam* actions, yet it is not required when dealing with *in rem* actions. "Legal niceties such-as *in rem* and *in personam* mean little to individuals faced with losing important and/or valuable assets." Because of a legal technicality, the government is able to defy the Eighth Amendment. There is no limit placed on the "prosecutorial" power of the government in this case. "... any property whether it be a hobo's hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction." *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 808-09, (8th Cir. 1992). And thus, as a modicum of fairness, the principle of proportionality **should** apply in actions that result in severe or harsh penalties. As stated by the Eighth Circuit of Appeals in *U.S. v. One Parcel of Property*, (1992), "We sincerely hope Congress examines § 881 and considers injecting some sort of proportionality requirement into the statute ..."

## B.

### THE APPELLATE COURT WAS INCORRECT IN HOLDING THAT FORFEITURE WAS APPROPRIATE

The government should not confiscate a person's only means of living; "forfeitures are not favored and should be enforced only when within both letter and spirit

of the law" *U. S. v. One 1976 Buick Skylark, 2 door coupe, Vehicle Identification No. 4W27C6K148647*, 453 F.Supp. 843 (1978). The government has the power to seize any property that is used for storage or transfer of controlled substances regardless of the quantity of the substance found. This allows the government virtually unlimited power. Therefore, allowing the government to interpret *in rem* laws as the unlimited power to confiscate property is a violation of both the purpose of forfeiture laws and the spirit of the United States statute.

The foundation on which the principle of punishment is based is deeply rooted in the fundamental belief of one person's ability to rehabilitate himself after a criminal act. Therefore, it is reasonable to say that any punishment that does not act to rehabilitate the assailant is based on the principle of revenge. In this legal society we must ensure that the punishment will serve to deter any future illicit action. The taking of a home, and a business is not necessary, because the business is the defendant's mean of sustenance, and the mobile home is essentially the only living area belonging to the defendant. The defendant, when released from his prison term, will enter a life without a form of housing as well as a business. This leaves the dealing of drugs as one of his few alternatives. If, however, he has his business and home, he could reenter life and would be wary of dealing drugs because of his previous jail term.

### C. **IN REM FORFEITURE, THE PUNISHMENT OF PROPERTY**

In an *in rem* forfeiture, the justification of the seizure is the guilt of the property and not the guilt of the individual. Therefore, provided that illicit activities were performed within the boundaries of the real property, the property is guilty and subject to forfeiture by the government. The financial situation of the person and extent of the crime committed is not weighed in deciding whether the forfeiture is legal. The owner of the real property is not considered in this manner.

It was decided by the Supreme Court of the United States, that a property that was purchased with funds given to the person by Joseph Brenna, who obtained the money "through illegal drug trafficking." It was decided in this case that the person was allowed to keep the property and was not "subject to forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970" *U.S. v. A parcel of land, building, Appurtenances, and Improvements, known as 92 Buena Vista Avenue, Rumson New Jersey*, Daily Appellate Report (2/24/1993). Under this decision the property was not guilty, even though it was purchased with money obtained "through illegal drug trafficking." In this case, obviously by ruling that the defendant was innocent because she had no knowledge of the origin of the monetary sum used to purchase the property, the court had taken into account the innocence of the defendant even though in true *in rem* forfeiture only the guilt of the property should play a deciding factor upon the court's decision. Hence it can be reasonably inferred that *in rem* forfeiture is not in fact dependent upon the guilt of the property, but dependent, to a significant degree, upon the guilt of the individual. *In personam* decisions are subject to proportionality in relation to the crime and the

individual. If indeed *in rem* forfeiture does apply to the individual's guilt, it borders upon those cases involving *in personam* forfeitures, and therefore should be placed under similar jurisdiction. Hence, *in personam* forfeiture should consider the crime involved as well as the individual. Therefore, the Eighth Amendment would apply to *in rem* forfeiture due to its intrusion upon *in personam*.

### CONCLUSION

The Eighth Circuit Court of Appeals was required to render a well-reasoned decision on the various issues before it at the time of respondent's appeal. We believe that the Eighth Circuit Court of Appeals made a decision that was in accordance to the precedence set in *in rem* forfeiture. However, we disagree with the current precedences set in *in rem* forfeiture.

The reasoning of the Courts, being based completely on precedence, excludes the basic understanding of principles in which these laws were created. Specifically, these are (i) that the forfeiture of one's home and business is disproportionate to the crime committed, constituting excessive fines, cruel and unusual punishment in violation of the Eighth Amendment, and a misinterpretation of *in rem* forfeiture in this circumstance; (ii) by seizure of Austin's property, (which constitutes his livelihood) a violation of the fundamental foundations of the basis of our legal system has occurred (to deter and rehabilitate past offenders); (iii) the intrusion of *in rem* forfeiture in the jurisdiction of *in personam* forfeiture, thereby, constituting the grounds for proportionality.

DATED: February 26, 1993.

Respectfully submitted,

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